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Civil Procedure—Acquiring Diversity Jurisdiction Over An Unincorporated Association

Federal diversity jurisdiction is premised on the existence of diversity of citizenship between all plaintiffs and all defendants.[1] The citizenship of a partnership or unincorporated association is, for purposes of determining federal diversity jurisdiction, that of each of its members.[2] As a result of this rule, many associations and their obligees find themselves barred from bringing suit on the basis of diversity in the federal courts. Courts and commentators have unsuccessfully advocated the establishment of an association jural entity, with citizenship based on the association's principal place of business[3] or on a consideration of the residences of the association's controlling members only.[4] Because of the attractiveness of the federal court system,[5] multistate unincorporated associations and those who wish to sue them have responded to the situation by devising means to circumvent this harsh requirement.

One method of obtaining diversity jurisdiction upon an unincorporated association is to bring an action on an association obligation, but only against the individual diverse members.[6] The partnership form lends itself particularly well to this type of action because each partner is responsible for liabilities of the partnership.[7] Thus, in *Jones Knitting Corp. v. A.M. Pullen & Co.*,[8] plaintiff was allowed to amend its complaint to drop the nondiverse partners

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1. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). The citizenship of an individual is determined by his domicile. Gilbert v. David, 235 U.S. 561 (1915). A corporation is a citizen of both the state of its principal place of business and that of its incorporation. 28 U.S.C. § 1332(c) (1976).

2. Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900); Chapman v. Barney, 129 U.S. 677 (1889). In United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965), the Supreme Court reaffirmed the rule by refusing to recognize a labor union as a judicial personality with a single residence. The Court felt that the expansion of diversity jurisdiction that would have resulted from such recognition was properly a matter for legislative action. Id. at 153. No such action has since been taken.

3. See, e.g., Mason v. American Express Co., 334 F.2d 392 (2d Cir. 1964); ALI Study of Division of Jurisdiction Between State and Federal Courts § 1301(b)(2) (1969); Comment, Citizenship of Unincorporated Associations for Diversity Purposes, 50 Va. L. Rev. 1135 (1964); Comment, Diversity Jurisdiction for Unincorporated Associations, 75 Yale L. J. 138 (1965). A similar result has already been achieved with regard to the residence of an unincorporated association for venue purposes. See Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556 (1967).

4. See generally Navarro Sav. Ass'n v. Lee, 446 U.S. 458 (1980) (Blackmun, J., dissenting); Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), cert. denied, 385 U.S. 817 (1966); Comment, Limited Partnerships and Federal Diversity Jurisdiction, 45 U. Chi. L. Rev. 384 (1978).

5. "[I]t is . . . generally acknowledged that the federal courts and federal judiciary in general enjoy a merited excellent reputation, and many attorneys have invoked diversity jurisdiction on behalf of their clients because of a preference for the procedures and judicial administration available in the federal courts." Moore & Weckstein, Diversity Jurisdiction: Past, Present, and Future, 43 Tex. L. Rev. 1, 23 (1964). The burgeoning diversity caseloads of the federal courts suggest the continued vitality of this statement.

6. See, e.g., Kaplan Co. v. Industrial Risk Insurers, 86 F.R.D. 484 (E.D. Pa. 1980); Hamond v. Clapp, 452 F. Supp. 885 (S.D.N.Y. 1978) (mem.); Isdaner v. Beyer, 53 F.R.D. 4 (E.D. Pa. 1971); Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. 311 (S.D.N.Y. 1970).

7. Uniform Partnership Act § 15.

8. 50 F.R.D. 311 (S.D.N.Y. 1970).

to avoid dismissal of the suit due to lack of diversity.[9] The district court defined the residence of a partnership as determined by the citizenship of those partners actually joined in the action and by the citizenship of those who, as indispensable parties, must be joined.[10]

Another procedure used to avoid diversity requirements is the class action suit, as applied to unincorporated associations by Federal Rule of Civil Procedure 23.2,[11] where diversity is based on the residences of the named representatives only.[12] The class action operates best when a large, decentralized association is involved—such as a nationwide labor union—and joinder of all members is unrealistic.[13] While the class action offers a simpler and procedurally more efficient lawsuit than does the *Jones*-type action, its availability for the purpose of avoiding diversity requirements is unclear. This Note will examine the full ramifications and effectiveness of both the class action and the *Jones* device.

To join less than all members in a suit on an association obligation presumes that each named member may be held individually accountable for the liabilities of the association. This is a question of state law that only incidentally concerns the question of federal diversity jurisdiction. Individual liability of a member of a nonpartnership, unincorporated association cannot be predicated on membership alone,[14] but may rest on participation in,[15] or knowledge and ratification of, an association act.[16] The lack of uniform individual liability renders a *Jones*-type procedure less attractive to one suing a nonpartnership association because it injects the additional issue of whether the named member participated in or ratified the act sued upon.

That a cause of action exists against an individual partner upon partnership liability, however, is clear from the Uniform Partnership Act (U.P.A.).[17] Section 15 provides that all partners are jointly and severally liable for the

9. Id. at 315-16.

10. Id. at 315.

11. "An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members." Fed. R. Civ. P. 23.2.

12. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Patrician Towers Owners, Inc. v. Fairchild, 513 F.2d 216 (4th Cir. 1975); Pyle v. Arthur Andersen & Co., 16 Fed. R. Serv. 2d 634 (D.C. Or. 1972).

13. See, e.g., Local 194, Retail, Wholesale & Dep't Store Union v. Standard Brands, Inc., 540 F.2d 864 (7th Cir. 1976); United Fed'n of Postal Clerks v. Watson, 409 F.2d 462 (D.C. Cir.), cert. denied, 396 U.S. 902 (1969); American Airlines, Inc. v. Transport Workers Union, 44 F.R.D. 47 (N.D. Okla. 1968).

14. Cox v. Government Employees Ins. Co., 126 F.2d 254, 256 (6th Cir. 1942); Vandervelde v. Put & Call Brokers & Dealers Ass'n, 43 F.R.D. 14, 17 (S.D.N.Y. 1967).

15. See Libby v. Perry, 311 A.2d 527, 534 (Me. 1973).

16. See Wilson & Co. v. United Packinghouse Workers, 181 F. Supp. 809, 815 (N.D. Iowa 1960); Fredstrom v. Giroux Post, No. 11 of Am. Legion, 94 F. Supp. 983, 985 (W.D. Mich. 1951). Such individual liability will generally be joint and several. See Dunlap Printing Co. v. Ryan, 275 Pa. 556, 119 A. 714 (1923). Members of a for-profit nonpartnership association may be personally liable for an association act just as partners would. See Burks v. Weast, 67 Cal. App. 745, 228 P. 541 (1924).

17. Adopted by 48 states and the District of Columbia as of January, 1980. 6 Uniform Laws Ann. 1 (Supp. 1981).

wrongful act or omission of any partner and for the misapplication of a third party's property and jointly liable for all other debts and obligations of the partnership.[18] By holding each partner individually liable for a partnership liability, the U.P.A. embraces, at least in this area,[19] the aggregate theory of partnership, where the partnership is nothing more than a grouping of individual partners.[20] The entity theory of partnership[21] requires an action on a partnership obligation to be brought against the partnership itself, as all legal rights and obligations flow from the entity, and partners are liable only through the primary liability of the entity. Thus, utilization of the *Jones* method of enforcing partnership obligations depends on the strength of the aggregate theory.[22]

The major limitation on the *Jones* procedure is the requirement that all indispensable parties to the litigation be joined.[23] Indispensability in the federal courts is governed by Federal Rule of Civil Procedure 19. In determining whether an action may proceed absent certain parties, rule 19 calls for a pragmatic consideration of the interests of the parties before the court, the interests of the parties absent from the court, and judicial economy.[24] The ultimate question of joinder is a matter of federal procedure and controlled by federal law.[25]

The most important consideration in determining the indispensability of jointly liable parties under the rule 19 approach is the posture of the parties to

18. All of these acts are chargeable to the partnership. Uniform Partnership Act §§ 13 & 14.

19. For a discussion of which areas of the U.P.A. reflect the aggregate theory, and which the entity theory, see Jensen, Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?, 16 Vand. L. Rev. 377 (1963).

20. W. Cary, Partnership Planning 7 (1970); J. Crane & A. Bromberg, Law of Partnership 27 (2d ed. 1968).

21. The entity theory has been adopted in the case law of two states. See Smith v. McMicken, 3 La. Ann. 319 (1848); Layman v. Readers' Digest Ass'n, Inc., 412 P.2d 192 (Okla. 1965), but there appears to be no real movement to revise Uniform Partnership Act § 15 to render the partners liable only through the partnership. The entity theory, however, is widely applied by courts in situations when equity requires, see Jensen, supra note 19, at 384-87, and has been applied within the framework of Section 15 in Southard v. Oil Equip. Corp., 296 P.2d 780, 784 (Okla. 1956).

22. When an action to enforce a partnership obligation is maintained against less than all partners as individuals, solely to acquire diversity jurisdiction, the argument exists that equity requires the entity's obligations to be pursued initially against the entity. This argument becomes more forceful when the number of partners sued and their involvement with the acts in question lessens. However, plaintiffs' need to use this procedure to acquire federal jurisdiction has implicitly been found to override these considerations in the *Jones* line of cases.

23. See Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. 311, 315 (S.D.N.Y. 1970).

24. Fed. R. Civ. P. 19(b). Under rule 19, persons materially interested in the subject of an action should be joined as parties so that they may be heard and a complete disposition of the case made. Id. 19(a). When this joinder cannot be accomplished—because of limitations on service of process, subject matter jurisdiction, or venue—the court must determine whether the particular persons are mere necessary parties, and thus the action may proceed in their absence, or whether the persons are indispensable parties, and thus the action must be dismissed. Id. 19(b). The factors affecting the determination include: the extent to which a judgment rendered in the person's absence might be prejudicial to him or those already parties; the potential for lessening or avoiding this prejudice by the shaping of relief; whether a judgment rendered in the person's absence will be adequate; and whether the plaintiff will have an adequate remedy if the action is dismissed. Id., Adv. Comm. Note.

25. See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 125 (1968).

the litigation. The served partners are potentially prejudiced by the possibility of their individual property being subject to levy and execution on a judgment[26] and the resulting need to bring an action against their partners for indemnification.[27] When the action is brought against most of the members of a stable ongoing business, where partnership ties are strong, courts recognize that joint assets will be voluntarily used to satisfy a judgment and thus the potential prejudice to any one member is slight.[28] However, if the potential exposure would tax the partnership assets, or if the partnership arrangement is more akin to an arms-length relation—as when corporations join together to pursue a joint venture in partnership form—these dangers assume a greater presence. Prejudice to the unjoined partners will depend on whether judgment may be executed on their portion of the joint assets[29] as well as on the strength of the partnership ties[30] and the res judicata effect on the unnamed partners of a judgment against the joined partners as individuals.[31]

Federal courts formerly based indispensability findings on state law and thus equated joint obligors, including all partners on a contract claim,[32] to indispensible parties, as dictated by the strict common law joinder rule.[33] Since the amendment of rule 19, these conclusory determinations in cases involving contractual relations have largely, but not invariably, been

26. See text accompanying notes 40-49 infra.

27. Uniform Partnership Act § 18(b) requires the partnership to indemnify every partner for payments made and liabilities reasonably incurred in the ordinary and proper conduct of business, subject to any agreement among the partners. Rights to indemnification may be excluded altogether by the partners' agreement. See Goff v. Bergerman, 97 Colo. 363, 368, 50 P.2d 59, 61 (1935). Upon dissolution, the liability of the partnership to indemnify a partner comes after liabilities to outside creditors. See Uniform Partnership Act § 40(b).

28. See, e.g., Hamond v. Clapp, 452 F. Supp. 885 (S.D.N.Y. 1978) (mem.) (one unjoined partner, law partnership); Isdaner v. Beyer, 53 F.R.D. 4 (E.D. Pa. 1971) (25 of over 200 partners in Touche, Ross & Co. were unjoined, total claim was $200,000); Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. 311 (S.D.N.Y. 1970) (defendant was accounting firm with 22 of 59 partners joined). While Rule 19 recognizes that it is desirable to settle controversies in wholes, the fact that a plaintiff could do so by bringing suit against all partners in state court has been held not to preclude proceeding in federal court. Kaplan Co. v. Industrial Risk Insurers, 86 F.R.D. 484 (E.D. Pa. 1980).

29. In Federal Resources Corp. v. Shoni Uranium Corp., 408 F.2d 875 (10th Cir. 1969), the partnership consisted of two corporations. Substantially all of the net income of one partner came from partnership operations. The claim was for just under two million dollars, and Wyoming law allowed a judgment against one of two partners to be executed on partnership property. These facts led the court to conclude that both corporations were indispensable parties to an action based on a partnership obligation, because the unjoined partner "might here be economically wiped out without ever having a day in court." Id. at 878.

30. See id. In Isdaner v. Beyer, 53 F.R.D. 4, 6 (E.D. Pa. 1971), the court emphasized that the unjoined partners would be represented by the same partnership counsel if there were any need of further litigation.

31. The large majority of courts that have considered the question have held that a judgment upon a partnership obligation against less than all partners does not conclusively establish the existence of a partnership debt as against another partner not made a party to the former proceeding or judgment. For a full listing of cases on the issue see Annot., 11 A.L.R.2d 847 (1950).

32. See text accompanying note 18 supra.

33. Since there is but one obligation and one cause of action for its breach, all joint obligors must be joined in the action. 2 S. Williston, Law of Contracts, § 327, at 668 (3d ed. W. Jaeger 1959); accord, Eastern Metals Corp. v. Martin, 191 F. Supp. 245, 250 (S.D.N.Y. 1960); Weaver v. Marcus, 73 F. Supp. 736, 738 (W.D. Va.), rev'd on other grounds, 165 F.2d 862 (1948).

eliminated.[34]

Another common law concept which has continued to affect federal indispensability analysis is the state joint debtor statute.[35] Originally designed to ameliorate the harsh effects of the common law joinder rule,[36] these statutes have recently been applied by federal courts to actions based on partnership liability for the purpose of determining that the unjoined partners were not indispensible parties to the action.[37] Courts so holding reason that since the statutes allow the action to continue against the joined partners alone, the unjoined partners are merely necessary parties, to be joined only if feasible.[38] Reliance on this theory is unnecessary under Federal Rule of Civil Procedure 19. Further, such an application ignores the procedural limitations built into the original operation of the statutes to prevent their use as a means for the plaintiff to choose which jointly liable partner he would sue.[39]

While bringing suit against less than all partners may be possible under Rule 19, there is less certainty in regard to the enforceability of the plaintiff's judgment. In a claim against one or more partners as individuals, partnership

34. See Isdaner v. Beyer, 53 F.R.D. 4 (E.D. Pa. 1971) (holding jointly liable partners not indispensable solely on basis of rule 19 balancing approach). But see Federal Resources Corp. v. Shoni Uranium Corp., 408 F.2d 875 (10th Cir. 1969) (holding both corporate partners indispensable parties to an action on a partnership contract, since contract was with partnership and not any individual partner); Codagnone v. Perrin, 16 Fed. R. Serv. 2d 989 (D.R.I. 1972) (in action against tortfeasor agent, principal held to be indispensable party).

35. These acts generally provide that "[w]here less than all the named defendants . . . are served with summons, the plaintiff may proceed against the parties served . . . and if the judgment is for the plaintiff it may be taken against all the defendants." N.Y. Civ. Prac. Law § 1501 (McKinney 1976). The New York statute, enacted in 1788, has served as a model in other states. See, e.g., N.C. Gen. Stat. § 1-113 (1969).

36. See McLoren, Venue, Process and Parties in Business Litigation, 1954 U. Ill. L.F. 557, 562. For a discussion of the historical development of the procedures used to lessen the effects of the strict common law rule in partnership cases, see generally Campbell, Partnership Obligations and Their Enforcement, 32 Chi.-Kent L. Rev. 127, 128-31 (1954). For a listing of statutory modifications to the rights and duties of joint obligors in general, see 2 S. Williston, supra note 33, § 336, at 697.

37. See Hamond v. Clapp, 152 F. Supp. 885 (S.D.N.Y. 1978) (mem.); Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. 311 (S.D.N.Y. 1970); James Talcott, Inc. v. Burke, 145 F. Supp. 489 (N.D. Ohio 1956) (one partner and the partnership entity declared not indispensable and venue requirements thereby met).

38. Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. at 315 (S.D.N.Y. 1970). See note 24 supra.

39. The language of the statute assumes that all jointly liable parties will be named as defendants and will remain as defendants until judgment. See Miller v. Farino, 58 A.D.2d 731, 395 N.Y.S.2d 867 (1977) (mem.); Spencer Kellogg & Sons, Inc. v. Bush, 31 Misc. 2d 70, 219 N.Y.S.2d 453 (Sup. Ct. 1961) (per curiam); Robertson v. Club Ephrata, 56 Wash. 2d 108, 351 P.2d 412 (1960); and N.C. Gen. Stat. § 1-113(1) (1969). Requiring joinder of all partners reflects the persistent belief that partnership debts are peculiarly joint in their substantive character, and thus partners should sue or be sued together except where procedural inequities would ensue. This view is evidenced by only eight states (Alabama, Arizona, Colorado, Mississippi, Missouri, North Carolina, Tennessee, Texas) having modified the joint liability of partners via the substantively controlling U.P.A., in the face of procedural modifications to allow suit against a single joint debtor in a large majority of jurisdictions. 6 Uniform Laws Ann. 38, 175 (1968 & Supp. 1981). Also, many state statutes now allow service to be made on a partnership through one of its members, leading to the same result as the joint debtor acts. But to effect such service, the partnership must be formally named in the complaint. See Johnson v. Albritton, 101 Fla. 1285, 134 So. 563 (1931); Rait v. Jacobs Bros., 49 Misc. 2d 903, 268 N.Y.S.2d 750 (Sup. Ct. 1966); Walsh v. Kirby, 228 Pa. St. 194, 77 A. 452 (1910).

assets will not be subject to judgment, even though the claim is predicated on a partnership act. The U.P.A. prohibits execution on specific partnership property unless the claim is against the partnership.[40] Since the plaintiff's purpose in a *Jones*-type action is to avoid serving all partners,[41] or the partnership itself,[42] such a claim would not run against the partnership property.[43] The same result is reached outside of the U.P.A. because if neither the partnership nor all partners are served, the served partners appear as individuals to protect their own interests only.[44] This follows from the general rule that a judgment rendered without notice to, or service on a defendant, in this case the partnership, is void for want of jurisdiction.[45]

Joint debtor statutes allow judgment to be executed on joint property when some partners are not served, but this result is based on constructive notice being given to the unserved partners through service on either the partnership entity or the served partners as representatives of the whole.[46] Constructive notice excuses service of process on the partnership, but its presence as a party to the action is still required.[47] Thus, judgment in a *Jones* action, whether proceeding under the U.P.A., the common law, or a joint debtor statute, is limited to the served partners' individual property,[48] which includes their rights to partnership income.[49]

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40. Uniform Partnership Act § 25(2)(c).

41. This was the only method of obtaining jurisdiction over a partnership at common law. See J. Crane & A. Bromberg, supra note 20, § 58(a). This method would support a judgment against partnership assets even if the partnership itself was not named as a party. See Palkovitz v. Second Fed. Sav. & Loan Ass'n, 412 Pa. 547, 195 A.2d 347 (1963).

42. Many states have statutes permitting a partnership to sue or be sued in its common name. J. Crane & A. Bromberg, supra note 20, § 57(b).

43. See McLaren, supra note 36, at 562.

44. In this situation the appearance of noninvolvement by the entity is reinforced where statutes confer jurisdiction over the partnership simply by naming the entity as a defendant while effecting service on any one partner. See J. Crane & A. Bromberg, supra note 20, § 60.

45. See 49 C.J.S. Judgments § 23, at 52 (1947), and cases cited thereunder, and Restatement of Judgments § 4 (1942).

46. The constitutionality of executing a judgment on partnership property that is jointly owned by unserved partners was upheld in Sugg v. Thornton, 132 U.S. 524 (1889). The court treated the partnership as a distinct legal entity. Id. at 530-31. See Comment, Jurisdiction over Partnerships, 37 Harv. L. Rev. 793, 804 (1924), for suggestion that application of joint debtor acts requires implicit recognition of the partnership entity as the conduit through which notice of the action is delivered to the unserved partners. But see Kittredge v. Grannis, 244 N.Y. 182, 155 N.E. 93 (1926) (the nonserved partners receive notice sufficient to allow a judgment on their commonly held property by virtue of the statute which provides for such a judgment on a joint claim, and service on one partner on a joint claim which names all defendants); J. Crane & A. Bromberg, supra note 20, § 59, for listing of cases applying joint debtor acts while rejecting entity theory.

47. See note 39 supra.

48. A line of early cases, primarily in Pennsylvania, reached a contrary result based on the pre-U.P.A. practice of allowing one partner to confess a judgment for a partnership debt without the consent of his partners. These cases reasoned that a plaintiff should be able to force a partner to apply partnership assets to satisfy a judgment because the partner could do so voluntarily. See, e.g., Winters v. Means, 25 Neb. 241, 41 N.W. 157 (1888); Harper v. Fox, 7 Watts & Serg. 142 (Pa. 1844). Uniform Partnership Act § 9(3), however, states that no partner has the power to confess a judgment against the partnership unless he is authorized to do so by all the partners. Thus the former practice should be unavailable today, and a judgment may be executed only on the assets of the individual served. See Fairman Bros. v. Ogden Gas Co., 106 Pa. Super. 130, 161 A. 634 (1932).

49. "A partner's interest in the partnership is his share of the profits and surplus, and the

Another procedural method utilized to preserve diversity in an action involving a multi-state, unincorporated association is to bring a class action suit under Federal Rule of Civil Procedure 23.2.[50] This is possible because the citizenship of the class is that of the named representatives only,[51] who can usually be chosen to insure complete diversity. Also, while all members of the association are not formal parties to the action, they are bound by the judgment.[52] Thus the *Jones* action's difficulties of executing judgment on the association's assets may be avoided. There are several unresolved issues regarding the proper interpretation of rule 23.2, however, that may proscribe its use in this context.

One issue is whether the requirements of rule 23(a)[53] must be satisfied in an action brought under rule 23.2. One school of thought emphasizes that rule 23.2 expressly incorporates one of the requirements of rule 23(a)—that the representative parties fairly and adequately protect the interests of the association—thus negatively implying that the remainder of rule 23(a) was intentionally omitted.[54] Further, because the purpose of rule 23.2 is to give entity treatment to associations through the class action device,[55] the formal requirements of rule 23(a) should be subordinated whenever they may prevent qualification of an association as a class.[56]

Several courts have taken the opposite view, however, on the grounds that the requirements of rule 23(a) are the essential foundation of any class action.[57] The numerosity requirement of rule 23(a), applied to rule 23.2 actions

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same is personal property." Uniform Partnership Act § 26. Any judgment creditor of a partner may petition a court of competent jurisdiction to charge the interest in the partnership of a debtor partner with payment of the unsatisfied amount of such judgment debt, and the court may appoint a receiver of his share of the profits. Id. § 28(1).

50. See note 11 supra. This rule was added in 1966 to deal specifically with actions relating to unincorporated associations. These actions had formerly been regulated by the general provisions of Rule 23. See Fed. R. Civ. P. 23.2 Adv. Comm. Note.

51. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Calagaz v. Calhoun, 309 F.2d 248 (5th Cir. 1962). With plaintiff partners, uniformly held to be indispensable parties, see J. Crane & A. Bromberg, supra note 20, § 55(a), this may be the only way for a national partnership to bring suit under diversity jurisdiction.

52. "It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present." Hansberry v. Lee, 311 U.S. 32, 42-43 (1940). See also Christopher v. Brusselback, 302 U.S. 500 (1938); Hartford Life Ins. Co. v. IBS, 237 U.S. 662 (1915).

53. These requirements are: 1) the class is so large that the joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative are typical of the claims or defenses of the class; and 4) the representative parties will adequately and fairly protect the interests of the class. Fed. R. Civ. P. 23(a).

54. See 7A C. Wright & A. Miller, Federal Practice and Procedure § 1861 (1972).

55. Fed. R. Civ. P. 23.2, Adv. Comm. Note.

56. See 7A C. Wright & A. Miller, supra note 54, § 1861; accord, Gay Liberation v. University of Mo., 416 F. Supp. 1350 (W.D. Mo.), rev'd on the merits, 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978); Management Television Sys., Inc. v. National Football League, 52 F.R.D. 162 (E.D. Pa. 1971). But see text accompanying notes 69-71 infra.

57. See Merkey v. Board of Regents, 344 F. Supp. 1296 (N.D. Fla.), vacated on other grounds, 493 F.2d 790 (6th Cir. 1973); Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348 (D.P.R. 1971); Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704 (D. Colo. 1966).

by two district courts,[58] presents the most compelling argument for application of rule 23(a). If there is no numerosity requirement, a two-man partnership could be sued as a class with only the diverse partner being named as the representative. Even short of this extreme position, use of rule 23.2 solely to achieve diversity may be improper. The general purpose of a class action is to allow suit to proceed where joinder of all parties is impractical,[59] and the purpose of rule 23.2 in particular is to permit suit where the impracticality stems from traditional procedural treatment of the unincorporated association.[60] Where modern procedures allowing associations to sue or be sued as an entity are available,[61] these purposes are inapposite and application of rule 23.2 is merely a means of circumscribing diversity requirements.

The issue whether a rule 23.2 action may proceed in the face of state laws granting unincorporated associations the capacity to sue or be sued is the second major question in this area. In general, capacity to sue in diversity actions is governed by state law.[62] Before rule 23.2 was enacted, a class action was unavailable where state law granting unincorporated associations capacity to sue was intended to be the exclusive means for an association to sue or be sued.[63] Where state law granting an association the capacity to sue was merely permissive, however, a class action was available.[64] It is unclear how rule 23.2 has changed the law in this area. Commentators[65] and one district court[66] have interpreted rule 23.2 as a procedural device which supplements state practice in this area. They argue that the *Erie* doctrine[67] requires this federal procedure to remain available even where state law clearly provides an exclusive means for an association to sue or be sued.[68]

Other courts, however, have relied on the Committee Note to rule 23.2 to support a different view.[69] The Note provides that the purpose of rule 23.2 is "to give 'entity treatment' to the association when for formal reasons it cannot sue or be sued as a jural person under rule 17(b)."[70] This suggests that the

58. Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348 (D.P.R. 1971); Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704 (D. Colo. 1966).

59. Hansberry v. Lee, 311 U.S. 32 (1940); Demarco v. Edens, 390 F.2d 836 (2d Cir. 1968); Montgomery Ward & Co. v. Langer, 168 F.2d 182 (8th Cir. 1948).

60. See Fed. R. Civ. P. 23.2, Adv. Comm. Note.

61. See note 42 supra.

62. Fed. R. Civ. P. 17(b).

63. Underwood v. Malone, 256 F.2d 334 (3d Cir.), cert. denied, 358 U.S. 864 (1958).

64. Oskoian v. Canuel, 269 F.2d 311 (1st Cir. 1959).

65. See 7A C. Wright & A. Miller, supra note 54, § 1861; 3B J. Moore, Federal Practice ¶ 23.2.02 (3d ed. 1980).

66. See Pyle v. Arthur Andersen & Co., 16 Fed. R. Serv. 2d 634 (D. Or. 1974).

67. If a matter is covered by a Federal Rule of Civil Procedure and that rule is valid, then it is controlling regardless of state law to the contrary. See Hanna v. Plumer, 380 U.S. 460 (1965); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

68. See 7A C. Wright & A. Miller, supra note 54, § 1861.

69. Patrician Towers Owners, Inc. v. Fairchild, 513 F.2d 216 (4th Cir. 1975); Lee v. Navarro Sav. Ass'n, 416 F. Supp. 1186 (N.D. Tex. 1976), rev'd on other grounds, 97 F.2d 421 (5th Cir. 1979), rev'd, 446 U.S. 458 (1980); Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348 (D.P.R. 1971).

70. Fed. R. Civ. P. 23.2, Adv. Comm. Note.

rule is not operative until Rule 17(b), which points to state law, prohibits entity treatment.[71] This would bar the use of a class action even in states which permissively allow unincorporated associations to sue or be sued in their common name.

The future use of Rule 23.2 to maintain diversity jurisdiction clearly hinges on the outcome of these issues. Imposition of the numerosity requirement of Rule 23(a) would prevent many associations from qualifying as a class, and the widespread availability of state statutes allowing entity treatment could virtually preclude use of Rule 23.2 in this context. The ongoing debate over these questions and resultant split in court decisions relegate the class action device to an uncertain means of maintaining federal diversity actions in many jurisdictions.

In the area of diversity jurisdiction over unincorporated associations, judicial development is at a crossroad. Federal courts have applied the same harsh rule of an association's residence through the past century.[72] In an effort to open the federal courts to unincorporated associations, litigators and courts have utilized divergent concepts such as joint debtor acts and class actions, and attempted to fit them into the diversity jurisdiction puzzle.[73]

Both procedural tools are designed to facilitate the bringing of a suit where joinder of a whole group is inconvenient. But they are not tailored to solve all the problems raised by their interaction with the rule of an association's residence in the diversity context, thus the procedural guidelines for unincorporated association litigation are less than plain. A *Jones* action exists by virtue of the aggregate theory of partnership, but that theory's uncertain foundation is undermined by this use. The geometric increase in the level of complexity of rules concerning judgments occasioned by the introduction of *Jones* procedures leaves unwary plaintiffs vulnerable to hard fought, yet unenforceable, judgments. Nor is the class action device a consistently effective tool. In many cases, its use is justifiable only through a desire to circumvent diversity requirements, and this leads to an opposing school of thought that would deny this possibility.

The purpose of this note is not to suggest a solution, but to expose some inherent dangers of the present situation. From this examination, however, it is apparent that a simpler procedural system would result from granting unincorporated associations a residence for diversity purposes. The pressure towards this end evidenced by the increased use of the *Jones* action and class action tools coupled with the willingness of many courts to accept such use of those procedures reflect an increasingly prevalent view that manipulative dangers are but necessary incidents to the more important consideration of pro-

71. See Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. at 355.

72. See note 2 supra.

73. Comment, Citizenship of Unincorporated Associations for Diversity Purposes, supra note 3, at 1142; Comment, Diversity Jurisdiction for Unincorporated Associations, supra note 3, at 143-44.

viding unincorporated associations with a much needed federal forum.[74]

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74. See 7A C. Wright & A. Miller, supra note 54, § 1861; Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1226 (1966).